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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MORTGAGE BROKERS
INTERNATIONAL, INC. et al.,

Plaintiffs and Appellants,

v.

MICHAEL M. WIENER et al.,

Defendants and Respondents.

E045159

(Super.Ct.No. SCVSS119517)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,
Judge. Affirmed.

Michael I. Goode for Plaintiff and Appellant Mortgage Brokers International, Inc.

Joseph Ogunrinu, in pro. per., for Plaintiff and Appellant.

LeBeau Thelen, LLP, Thomas P. Feher and Franklin D. Gordon for Defendants
and Respondents Michael M. Wiener et al.

Law Offices of Thomas N. Jacobson and Thomas N. Jacobson for Defendant and
Respondent Doug Jacobs and Jacobs Development Co.

1. Introduction

Joseph Ogunrinu,¹ a real estate broker, sued to recover a commission from the sale of vacant real property in Fontana. The trial court granted the summary judgment motions brought by the buyer, Jacobs,² and the seller, Wiener.³

On appeal, the primary issue concerns whether the statute of frauds bars Ogunrinu's claim for a broker's commission, which was based on an oral agreement. In the absence of disputed material facts, we affirm the judgment in favor of defendants.

2. Factual and Procedural Background

a. The Complaint

Ogunrinu filed a complaint for 10 counts of fraud, breach of contract, and related claims against defendants. The Wiener defendants were named in the first cause of action for fraud, the third cause of action for violation of Business and Professions Code section 17200 et seq., the fourth cause of action for breach of contract, the seventh cause of action for violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), the eighth cause of action for unjust enrichment, and the ninth cause of action for a broker's commission. The Jacobs defendants were named in the second cause of action for intentional interference with prospective economic advantage. All defendants were

¹ Plaintiffs are Ogunrinu and his corporation, Mortgage Brokers International, Inc., a Delaware corporation, doing business as Buckingham and Associates.

² The buyers are Doug Jacobs and Doug Jacobs Development Company.

³ The sellers are Michael Wiener and affiliated companies, corporations, individuals, trustees, and trusts named as defendants.

named in the fifth cause of action for breach of the covenant of good faith and fair dealing and the sixth cause of action for alter ego liability. Doug Jacobs and Michael Wiener were sued as individuals on the tenth cause of action for civil conspiracy.

b. The Summary Judgment Motions

Defendants filed separate summary judgment motions. For the most part, Ogunrinu did not expressly identify in his separate statement opposing evidence supporting the existence of disputed material facts. (Code Civ. Proc., § 437c, subd. (b); see also *id.*, subd. (p)(2) [opposing party may not rely on mere allegations or denials in its pleadings]; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640, 641.) Instead, Ogunrinu simply disagreed with defendants' factual assertions and offered legal arguments based on his interpretation of the evidence. But, having reviewed the parties' separate statements, we conclude the following material facts were not disputed, or not effectively disputed, for purposes of summary judgment.

Ogunrinu was a licensed real estate broker. Wiener owned a vacant parcel of property on Sierra Avenue in Fontana. Ogunrinu contacted Wiener about whether he would entertain sales offers for the property.

Wiener never signed a listing agreement employing Ogunrinu as a broker or agreeing to pay him a commission. Ogunrinu also did not have any written agreement with Jacobs.

On December 19, 2003, Wiener communicated by email with Ogunrinu, rejecting an offer from Jacobs to purchase the property.

Wiener accepted a subsequent offer by Jacobs. The written purchase agreement between Wiener and Jacobs included the following ungrammatical language: “Buyer agrees to pay . . . Ogunrinu . . . a brokerage commission agreement pursuant to a separate agreement between Buyer and Broker.”

After Jacobs completed the purchase of the property, Ogunrinu claimed he was entitled to be paid a commission of 10 percent.

The trial court granted summary judgment in favor of defendants.

3. Discussion

We conduct a de novo review of the grant of a motion for summary judgment. (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356.) Our review is hampered by Ogunrinu’s failure in the lower court to follow correctly the procedures for opposing a summary judgment motion as required by Code of Civil Procedure section 437c, as well as his lack of compliance on appeal with California Rules of Court, rule 8.883(a)(1)(B), requiring that a brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” Nevertheless, we conclude there is no dispute about the basic facts.

Ogunrinu’s primary contention is that an oral agreement existed between him and Wiener for a broker’s commission, which was reflected in a written agreement. The provision in the purchase agreement, however, refers to a commission to be paid by Jacobs, the buyer, not Wiener, the seller. Furthermore, Ogunrinu admits he did not have a listing agreement with Wiener or a written agreement with Jacobs. Notwithstanding

these anomalies, the case law provides that a broker cannot recover on an oral agreement for a commission. (*Phillippe v. Shappell Industries, Inc.* (1987) 43 Cal.3d 1247.)

Civil Code section 1624, subdivision (d), provides that an agreement authorizing or employing a broker to purchase or sell real estate is invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or by his agent. Any agreement to perform services for the purchase or sale of real property is subject to Civil Code section 1624, subdivision (d). (*Phillippe v. Shappell Industries, Inc.*, *supra*, 43 Cal.3d at p. 1256, citing *Owen v. National Container Corp. of Cal.* (1952) 115 Cal.App.2d 21, 28.)

Ogunrinu's reliance on *Radar Company, Inc. v. Stone* (1986) 178 Cal.App.3d 10, 21-30, is misplaced. *Radar* is factually distinguishable because it involved a series of written solicitations by a landlord to brokers to find a tenant and be paid a commission. In *Radar*, the court held the express writings were sufficient to avoid the statute of frauds. In the present case, the only writing is a provision in the purchase agreement between Wiener and Jacobs which refers to a purported separate agreement between Jacobs and Ogunrinu. But no such separate written agreement exists.

The statute of frauds applies to a claim for a broker's commission regardless of the theory of recovery. Ogunrinu has no chance of prevailing on his four contractually-related causes of action against Wiener for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, or recovery of a broker's commission or on his claim against Jacobs for breach of the covenant of good faith and fair dealing. The contract claims are all subject to the statute of frauds.

Nor can Ogunrinu succeed on the remaining causes of action. The fraud claim against Wiener fails because a broker cannot reasonably rely on a promise which is not enforceable under the statute of frauds. (*Phillippe v. Shappell Industries, Inc.*, *supra*, 43 Cal.3d at pp. 1264, 1270.)

The second cause of action against Jacobs for intentional interference with economic advantage is also barred by the statute of frauds. Without an enforceable written agreement, Ogunrinu can never establish causation, that it was “reasonably *probable* that the lost economic advantage would have been realized but for the defendant’s interference.” (*Youst v. Longo* (1987) 43 Cal.3d 64, 71.)

The third cause of action for violation of Business and Professions Code section 17200 et seq. is not viable against Wiener because money damages, i.e., a broker’s commission, cannot be recovered under section 17200: “A UCL [unfair competition law] action is equitable in nature; damages cannot be recovered.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.)

In his appellant’s opening brief, Ogunrinu abandoned his alter ego claim against the Wiener defendants. His claim for alter ego liability against Jacobs is not legally cognizable as an independent cause of action. Notwithstanding that defect, there is no underlying obligation owed to Ogunrinu by Jacobs. (*Design Associates, Inc. v. Welch* (1964) 224 Cal.App.2d 165, 171.)

Regarding the seventh cause of action for Unruh Civil Rights Act (Civ. Code, § 51 et seq.) violations, Ogunrinu offered no evidence whatsoever that Wiener discriminated against him because he was a Nigerian-born American. Instead, Ogunrinu simply

referred to the complaint without citing any evidence. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.)

The conspiracy claim, brought against Michael Wiener and Doug Jacobs as individuals, is not a separate and distinct cause of action and cannot be sustained independently of another cause of action. (*Harrell v. 20th Century Ins. Co.* (9th. Circ. 1991) 934 F.2d 203, 208.)

Finally, we observe that, on appeal and at oral argument, Ogunrinu adopted new arguments that were not presented below and, in some aspects, contradict his earlier positions. He has also introduced facts that were not part of the record for the summary judgment motions. We have mostly disregarded these alterations: “[T]he general rule is that a party may not for the first time on appeal change his theory of recovery.” (*Phillippe v. Shappell Industries, Inc., supra*, 43 Cal.3d at p. 1256.)

4. Disposition

We affirm the judgment. Defendants, the prevailing parties, shall recover their costs on appeal.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Miller
J.